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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIZZIE ETTA LEMONS and
BENNIE MAURICE LEMONS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

JURISDICTION AND STATEMENT
OF THE CASE

Appellants Lizzie Etta Lemons and Bennie Maurice Lemons were indicted on July 20, 1966, by the Federal Grand Jury for the Southern District of California, Central Division. ^{1/}

This indictment which was in four counts, charged essentially in Count One, that defendant Lizzie Etta Lemons, together with one Margaret Ward, unlawfully concealed 7.5 grams of heroin, in violation of 21 United States Code, Section 174. Count Two charged

^{1/} C. T. 2; "C. T." refers to Clerk's Transcript of proceedings.

Lizzie Etta Lemons and Margaret Ward with the unlawful sale of that same heroin. Count Three charged appellant Lizzie Etta Lemons with the concealment of 24 grams of heroin, in violation of Title 21, United States Code, Section 174. And Count Four charged appellant Bennie Maurice Lemons with the concealment of 101 grams of heroin in violation of Title 21, United States Code, Section 174 [C. T. 2-4].

On August 22, 1966, the indictment was ordered dismissed as to appellant Margaret Ward [C. T. 61].

Appellants Lizzie Etta Lemons and Bennie Maurice Lemons filed a Motion to Suppress Evidence on August 15, 1966, and the Government filed its opposition and supporting affidavits on August 15, 1966 [C. T. 14-20, 42-49].

The motion to suppress was heard and denied, and jury trial commenced as to appellants before the Honorable Walter E. Craig, United States District Judge, on August 22, 1966 [C. T. 68]. Further hearings were had on the Motion to Suppress on August 23, 1966, and the motion was again denied [C. T. 69].

On August 23, 1966, at 11:25 A.M., the case was given to the jury for their consideration, and the Court ordered that the jurors be furnished with meals and lodging during the period of their deliberation [C. T. 69]. On August 23, 1966, at 11:48 P.M., the jury was excused from deliberating further until 9:00 A.M., August 24, 1966. Appellants moved for a mistrial, which was denied [C. T. 69].

On August 24, 1966, the jury resumed their deliberations

at 9:15 A.M., and at 1:55 P.M. appellants again moved for a mistrial, which motion was again denied [C. T. 72]. At 2:05 P.M., at the jury's request, the Court re-instructed the jury, after they stated they had reached a verdict as to one of the appellants, and the jury retired at 2:37 P.M., to further consider the case [C. T. 72]. At 3:15 P.M., the jury returned a verdict of guilty as to both appellants, and as to all counts in which they were charged [C. T. 72, 58-59].

On September 13, 1966, appellants were both sentenced to imprisonment for a period of five years [C. T. 70-71].

Notices of appeal were filed on September 13, 1966 [C. T. 82-83).

The jurisdiction of the District Court is predicated on Title 21, United States Code, Section 174, and Title 18, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Section 1291 and Section 1294, Title 28 of the United States Code.

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or

brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than \$20,000

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT OF FACTS

On July 14, 1966, officers of the Los Angeles Police Department and the State Bureau of Narcotics Enforcement, together with one James Bircher, proceeded to 1715 and 1721 South Mira Monte Street in Ontario, California. ^{2/}

The Police Officers, who arrived in two automobiles [R. T. 8], had previously searched Bircher, who was a reliable informant, and found no narcotics on his person [C. T. 37; R. T. 10].

The informant approached the door of the dwelling house of Margaret Ward located at 1715 South Mira Monte, and was granted admittance [C. T. 37-38; R. T. 11].

^{2/} C. T. 37; R. T. 8; "R. T." refers to Reporter's Transcript of proceedings.

Approximately ten minutes later, the informant left the premises at 1715 South Mira Monte and proceeded next door to the premises located at 1721 South Mira Monte, where he was greeted at the door by appellant Lizzie Etta Lemons [C. T. 38; R. T. 19].

The informant handed a sum of currency to appellant Lizzie Etta Lemons, at the screen door of the Lemons' house, and she handed a package to the informant [C. T. 38; R. T. 21-22, 39-40, 65].

The informant then returned to the officers' car and gave them a celluloid container of what appeared to be heroin [C. T. 38; R. T. 33, 40-41], stating that it had been handed to him by appellant Lizzie Etta Lemons, pursuant to a telephone call made in his presence by Margaret Ward while the informant was in appellant Ward's house [C. T. 38].

The officers approached and knocked at the door of appellant's house. Receiving no response, they announced that they were police officers there to make an arrest for a narcotic violation and forced the door open [C. T. 38; R. T. 41-42].

In the back bedroom they found appellant Lizzie Etta Lemons counting the \$150 of pre-recorded state funds which had been handed her by the informant [C. T. 38; R. T. 42, 88]. They arrested her and advised her of her constitutional rights [C. T. 39; R. T. 42-43]. A search was made, at the time of the arrest, and an additional quantity of heroin was found in a metal box under the bed [C. T. 39; R. T. 68].

Appellant Lizzie Etta Lemons told the officers at the time

that her husband, appellant Bennie Maurice Lemons, was down in Tijuana, Mexico, but would be back later in the evening [C. T. 39; R. T. 44].

Some of the officers waited at the residence until approximately 12:30 A. M., when appellant Bennie Maurice Lemons arrived, and a subsequent search of his person disclosed a quantity of heroin inside his girdle [C. T. 39; R. T. 45-47].

ARGUMENT

I

THE MOTION TO SUPPRESS WAS PROPERLY DENIED

A. Probable Cause to Arrest Appellant Lizzie Etta Lemons Existed Where Officers Watched Her Hand a Package to a Reliable Informant and Subsequent Inspection of Package Showed That it Appeared to Contain Heroin.

B. Probable Cause to Arrest Appellant Bennie Maurice Lemons Existed Where Officers Found Heroin in His Bedroom and His Wife Had Stated He Was Returning From Mexico That Evening.

The validity of an arrest made by state officers without a warrant is to be determined by the law of the state in which the arrest was made. Miller v. United States (1958), 357 U.S. 301, 2 L.Ed.2d 1332, 78 S. Ct. 1190; United States v. Di Re (1948), 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210. Under California law, an

arrest without a warrant is justified if the arresting officer has probable cause to believe that the person arrested has committed a felony. People v. Coleman (1965), 235 Cal. App. 2d 612, 45 Cal. Rptr. 542; California Penal Code, Section 836.

Probable cause for arrest is not limited to evidence that would be admissible at trial on the issue of guilt; the test is whether the facts as they appeared to the officers at the time of the arrest were such that a reasonable man would conclude that the arrested person should be held to answer. People v. Murphy, 173 Cal. App. 2d 367, 377, 343 P. 2d 273 (1959).

In the case of appellant Lizzie Etta Lemons, the officers had probable cause to arrest because they watched a reliable informant hand her a sum of money and saw her, in return, hand him a package which, upon inspection, appeared to contain heroin.

In the case of appellant Bennie Maurice Lemons, the officers had probable cause to arrest in that they had found narcotics under the bed in his home through a search incidental to the valid arrest of his wife and, further, his wife had told the police officers that he was returning from Mexico in a short time. The officers did not have practicable opportunity to obtain a warrant for the arrest of Bennie Maurice Lemons, because he was expected to return, and did in fact return, only a short time after the arrest of his wife. If he had been given a chance to see that the front door was broken he might have surmised what happened and destroyed the contraband in his possession.

II

THERE WAS NO "MISCONDUCT" WITH REGARD TO THE JURY'S DELIBERATIONS.

The Court instructed the jury that if it wished to communicate with the Court it could do so by means of a signed writing [R. T. 154]. There is no record that any juror took advantage of this offer to complain of any inconvenience. Nor did anyone bring any such matter up whenever the jury was in the courtroom. In the state of the record, appellants' assertions that the jury was deprived of "an atmosphere of free and unrestrained deliberations" is nothing more than unwarranted conjecture.

III

APPELLANTS WERE NOT DEPRIVED OF DUE PROCESS BY BEING ARRESTED TWICE.

Appellants were originally arrested by state officers for state narcotics violations. Thereafter, an indictment was returned by the Federal Grand Jury, and the appellants were arrested on warrants issued thereupon [R. T. 110].

Even if appellants could find authority for the somewhat novel proposition that two arrests on the same charge violate "due process" requiring dismissal of further prosecution or reversal, such authority would not be appropriate here, since the record discloses

that the two arrests were made for different violations, one local and the other federal.

CONCLUSION

An examination of the entire record indicates that appellants received a fair trial and, there being no prejudicial error, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.

